Supreme Court of the United States,

OCTOBER TERM, 1938

No. 252

JOSEPH S. FINCH & COMPANY, THE OLD QUAKER COMPANY, and SCHENLEY DISTRIBUTORS, INC., Appellants,

vs.

ROY MCKITTRICK, Attorney General of the State of Missouri, et al.

No. 253

BEN BURK, INC. Appellant,

vs.

ROY MCKITTRICK, Attorney General of the State of Missouri, et al.

No. 254

JOSEPH E. SEAGRAM & SONS, INCORPORATED, and SEAGRAM-DISTILLERS CORPORATION, Appellants,

vs.

ROY MCKITTRICK, Attorney General of the State of Missouri, et al.

No. 255

HINRICHS DISTILLED PRODUCTS, Appellant,

vs.

ROY MCKITTRICK, Attorney General of the State of Missouri, et al.

No. 256

ARROW DISTILLERIES, INC. Appellant,

vs.

ROY MCKITTRICK, Attorney General of the State of Missouri, et al.

APPELLANTS' BRIEF

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Statement

These suits in equity were instituted October 20, 1937 in the United States District Court for the Western District of Missouri, Middle Division, to restrain the defendants, respectively the Attorney General and the Supervisor of Liquor Control of the State of Missouri, from enforcing the provisions of a Missouri statute (Laws of Missouri, 1937, pp. 536-543, both inclusive). (8)[1] As to the appellants in four of the causes, enforcement of the statute would prohibit them from importing into Missouri, under Missouri import licenses duly issued to them, alcoholic beverages manufactured in Indiana, Pennsylvania, Massachusetts and Michigan. As to the appellant in the fifth cause, a Missouri rectifier, enforcement of the statute would prohibit it from purchasing, receiving, possessing or selling any alcoholic liquor in Missouri manufactured in the same states. The ground upon which the suits were brought is that the statute in question violates various provisions of the Federal Constitution, notably Article I, Section 8, commonly referred to as the "Commerce Clause" and that, therefore, the attempted prohibitions are void.

The statute in question is hereinafter referred to as the "Missouri Retaliation Act." An inspection of its provisions shows that it is retaliatory in its purpose. (18)

On October 20, 1937 the District Court granted appellants temporary restraining orders. It set December 7, 1937 as the return date for the hearing of appellants' motions for preliminary injunctions before a three judge statutory court. Judicial Code, Sec. 266; 28 U.S.C.A. §380.

December 10, 1937, appellees moved to dismiss the complaints upon the ground that each did not state facts sufficient to constitute a cause of action. (66) The hearing on

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[1] All figures in parenthesis contained in this brief are, unless otherwise indicated, references to folios in the Transcript of Record.

these motions and the preliminary injunction motions was adjourned to January 10, 1938 and by stipulation of the parties it was agreed that the hearings upon these matters should be treated as a final hearing upon the merits, there being no dispute as to the facts involved in these cases. (68)

On February 23, 1938 the statutory court ruled the statute in question constitutional. It, therefore, denied appellants the injunctions prayed for and granted the appellees' motions for judgment dismissing the complaints. (107)

The lower Court's opinion is reported at 23 Fed. Supp. 244.

March 16, 1938 judgments in the five cases were entered in favor of the appellees dismissing the complaints. (70)

These appeals were taken on June 3, 1938. (76)

The jurisdiction of this Court to hear these appeals depends upon the Act of Congress of June 18, 1910, Ch. 309, Sec. 17, 36 Stat. 357; March 3, 1911, Ch. 231, Sec. 266, 36 Stat. 1162; March 4, 1913, Ch. 160, 37 Stat. 1013; February 13, 1926, Ch. 229, Sec. 1, 43 Stat. 936-938 (28 U.S.C.A., Sec. 380).

An order noting probable jurisdiction of these appeals was made by this Court October 10, 1938.

FACTS

On April 8, 1937 the Governor of Missouri approved an Act of the Legislature, now known as the Missouri Retaliation Act (Laws of Missouri, 1937, pp. 536-543). The statute itself appears at pp. 11-20 of the Record. It is too long to be conveniently set forth here in full. A summary of its provisions here will be sufficient for this discussion.

By the provisions of the statute in question, certain exactions, prohibitions and restrictions imposed by the laws, rules or regulations of the several states upon the importation into such states of alcoholic liquors manufactured in Missouri are denominated discriminatory laws. (18) The statute requires the Attorney General of Missouri

to examine the laws, rules and regulations of the several states to determine whether there exists therein any such discriminatory laws as defined by the Missouri statute; and, if he finds such laws he is required, within thirty days of the effective date of the statute, to file a certificate with the Supervisor of Liquor Control of Missouri specifying the alleged discriminations contained in the laws of each of such states. The statute then requires the Supervisor of Liquor Control of Missouri to publish forthwith a notice advising all Missouri licensees of the filing of such certificates, listing therein the states in which discriminatory laws are found to exist by the Attorney General and stating that after forty-five days from the date of the publication of such notice it will be unlawful to import or transport into Missouri, or to purchase, receive, possess or sell any alcoholic liquor in Missouri which is manufactured in any state named in any of said certificates. A copy of this published notice is also required by the statute to be sent to each holder of a Missouri wholesale liquor license.

Section 4 of the statute then provides:

> "Importation of alcoholic liquor from state in which discrimination exists prohibited.
>
> "The transportation or importation into this state, or the purchase, sale, receipt, or possession herein, by any licensee, of any alcoholic liquor manufactured in a 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined."

The statute gives a right of appeal from the finding of the Attorney General and also provides that the provisions of the statute shall be deemed to be incorporated in every wholesale liquor license issued by the State of Missouri.

Acting in accordance with the direction of the statute, the Attorney General of Missouri on October 20, 1937 filed certificates with the Supervisor of Liquor Control of Mis-

souri, certifying that the states of Indiana, Pennsylvania, Michigan and Massachusetts were "states in which discriminations existed" as defined by the Missouri statute. (32)

Appellant Schenley Distributors, Inc., is a Delaware corporation. It maintains an office in the City of St. Louis, Missouri, from which it solicits orders from dealers in alcoholic beverages in Missouri for the products of The Old Quaker Company, whose distillery is located in Indiana, and Joseph S. Finch and Company, whose distillery is located in Pennsylvania. Schenley is and has been the holder and owner of a non-resident Missouri permit authorizing it to solicit orders from wholesalers duly licensed by the State of Missouri. Schenley has expended large sums of money advertising the products of the Finch and Quaker companies in Missouri. Since repeal there has been imported by the Schenley Company into the State of Missouri and sold therein in excess of $1,000,000 worth of alcoholic beverages produced at The Old Quaker Company distillery in Indiana and a like amount produced at the Finch Company distillery in Pennsylvania. (11-15)

Appellant Ben Burk, Inc., is a Massachusetts corporation and holds a Missouri non-resident license pursuant to which it imports and sells in Missouri various alcoholic beverages manufactured by it in the City of Boston, Massachusetts.

Appellant Seagram-Distillers Corporation is a Delaware corporation and under contract purchases from appellant Joseph E. Seagram & Sons, Inc., an Indiana corporation, its entire production and output of alcoholic beverages produced at its plant in Indiana. Seagram-Distillers Corporation has been, and is, the holder of a non-resident license issued by the Supervisor of Liquor Control of Missouri and under such license is authorized to solicit orders for the sale of alcoholic beverages in Missouri produced by

Joseph E. Seagram & Sons, Inc., at its distilling plant in Indiana.

Appellant Hinrichs Distilled Products is a Missouri corporation licensed to engage in the wholesale alcoholic beverage business by the State of Missouri. It imports alcoholic liquors from Indiana and rectifies and bottles them in Missouri for sale therein. It also has in storage in the State of Indiana a large stock of whiskey distilled in that state, which it will be unable to bring into Missouri for use in its business if the Missouri Retaliation Act is sustained.

Appellant Arrow Distilleries, Inc., is a Michigan corporation which operates in Missouri under a license pursuant to which it imports and sells in Missouri alcoholic beverages rectified by it at its plant in Detroit, Michigan.

All the appellants will be barred from importing their products into Missouri in interstate commerce in the event that the discriminatory prohibition provided for in the Missouri Retaliation Act is put into effect by appellees and is sustained by the Court as a proper exercise of power over the liquor traffic by the State of Missouri. They will suffer incalculable damage by reason of the loss of large markets and wiping out of their good will and business contacts in Missouri which they have built up at large expense and with much effort.

QUESTION PRESENTED

The question presented is whether the State of Missouri, which recognizes wines, beers and spirituous liquors as articles of lawful consumption and commerce, may exclude from its borders such articles manufactured in certain states for the sole reason that those states discriminate against beer manufactured in Missouri, while admitting such articles produced in all other states.

Stated in constitutional terms, the question is whether the Commerce Clause has been altogether removed as a limitation on the power of the states to deal with the traffic in intoxicating liquors. For unless that clause is entirely gone the Missouri Retaliation Statute involved in these cases cannot stand. The court below faced that as the question and answered it in the affirmative on the ground that, with regard to intoxicating liquors, the Twenty-first Amendment had placed the Nation "again in the same situation in which it was as to all commerce before the adoption of the Constitution."

It is our position that the Commerce Clause has not been entirely destroyed, though, of course, it has been modified, by the Twenty-first Amendment and that, even as so modified, it invalidates the Missouri statute. In the development of our position we will discuss the invalidity of the statute apart from the Twenty-first Amendment for the purpose of showing its hostility to the basic character of the Union as manifested by the Commerce Clause; thereafter we will make and support the point that the statute is not saved by the Amendment. The interpretation of the Amendment which we urge is, we respectfully submit, the only interpretation justified by both the language and the purpose of the Amendment. Moreover, that interpretation, and the method suggested for its application, will not defeat the purpose of the Amendment but, on the contrary, will give room for its operation in a wide field. But before we come to the development of our position we believe we can put the problem in a clearer light and in a more sharply defined setting by first asking the Court to observe certain matters concerning the scope of the constitutional issue and its importance when measured by what is involved in it, and the fact that the issue is not foreclosed by any prior decision of this Court.

Scope of the Constitutional Issue

The scope of the question can be more sharply drawn

by indicating what is *not* involved. It will be observed that the Missouri statute in question does not bar the importation of all liquors into the State of Missouri but only those manufactured in states which have laws found by Missouri's Attorney General to discriminate against alcoholic beverage manufacturers of Missouri. It permits the free flow of liquor into Missouri from certain states not under the ban of the Attorney General but bars liquors manufactured in other states. The Missouri statute is not related to the protection of the health, safety and morality of the people of Missouri as affected by the use of intoxicating liquors. It does not further the social welfare of the people of Missouri.

On the contrary, it is designed to influence legislation in certain states by economic pressure exercised upon a certain class of citizens of those other states. It is an economic weapon pure and simple—of a kind used by nations in international trade wars and of a kind common in the states prior to the adoption of the Federal Constitution. The Missouri statute is a plain act of economic retaliation by one state against another.

But the problem before the Court, to the extent that the Twenty-first Amendment is involved, *is still one of prohibition*. The prohibition question was not settled by the repeal of the Eighteenth Amendment: it was merely returned to the states. The repeal of the Eighteenth Amendment, of course, did put an end to one phase of the matter: it took Congress out of the internal and concurrent "police" area and it stopped the national experiment in the general prohibition field. But it was a prohibition problem which was returned to the states by the Twenty-first Amendment. In the interpretation of the Twenty-first Amendment, therefore, the social aspects of state power over intoxicating liquors (as distinguished from those of tariffs and trade rivalries) must be kept in view. The Twenty-first Amendment is as truly concerned with prohibition as was the

Eighteenth.

We do not suggest that any comprehensive definition be attempted as to what laws of the state are contemplated in the Twenty-first Amendment. We do suggest that the method for determining what laws are so contemplated is essentially the same as that in due process cases, namely, by the gradual process of inclusion and exclusion. We fully realize that the terms "dry" and "wet" furnish no sure criteria for determining which laws on the subject of intoxicating liquors must be respected by reason of the Amendment. Yet, we believe that they constitute helpful points of beginning. They were used frequently in congressional debate and elsewhere. Indeed, the history of Section 2 is written largely in terms of the struggle of "dry" states to ward off invasions from "wet" states. Surely a term of such wide and popular usage cannot be without some significance in this Court.

A "dry" state is distinguishable from a "wet" state, just as day is distinguishable from night, whatever may be the difficulty of drawing the line where one ceases and the other begins. At one extreme is the state, called "dry," which prohibits the manufacture, sale, or use of intoxicating liquors. At the other extreme is the state, called "wet," which undertakes no limits in the use and merely provides a licensing or other plan for the sale. In between, the situations may shade all the way from one extreme to the other. But in order for any state law to be within the scope and operation of the Amendment it must have some appreciable relationship to the promotion of the health, safety and morality of the people of the state as affected by the use of intoxicating liquors.

This is precisely the view taken by this Court with regard to the interpretation of the Wilson Act, the progenitor of both the Webb-Kenyon Act and the Twenty-first Amendment. *Scott* v. *Donald*, 165 U. S. 58 (1897) invalidated certain

features of the so-called dispensary law of South Carolina. The Court said that, so long as state legislation "continues to recognize wines, beer and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles." (p. 91)

Importance of the Constitutional Issue

Not only is it necessary that the Constitutional question thus presented to the Court in these cases be passed upon for the purpose of disposing of the instant litigation, but a case is here presented which requires determination for the purpose of clarifying the law in guiding the lower courts in their disposition of similar questions and placing before the public a concise statement as to whether the type of legislation here under attack is valid by reason of the provisions of the Twenty-first Amendment.

The interpretation of the Twenty-first Amendment given by the court below to the effect that we are today, with respect to intoxicating liquors, back in the same situation we were prior to the adoption of the Federal Constitution, will give fresh impetus to the expansion of the scope and extent of trade wars between the states. It will also cast doubt upon the whole Federal scheme of liquor control regulation enacted into law since the repeal of the Eighteenth Amendment. 27 U.S.C.A. §201-212.

If states are held to have full freedom to enact statutes such as those here challenged under the supposed effect of the Twenty-first Amendment, they will exercise it. This country is already witnessing a rise and spread of economic

nationalism along sectional and state lines.[2] The Court must decide whether the Nation again is in that same situation with respect to intoxicating liquor today in which it was as to all commerce before the adoption of the Constitution.[3] The Missouri retaliation Statute here challenged is both illustrative and suggestive. It shows the beginning of a widening circle. Indiana discriminates against a Missouri product—beer. Missouri retaliates by proscribing both beer and other Indiana products, namely, whiskey and other liquors. The retaliation thus spreads from beer to the whole field of intoxicating liquors but, practically, there is no reason why one state should limit its proscription to the field of intoxicating liquors. Under the ruling of the court below there would be nothing to prevent a great grain growing state's prohibiting the introduction of intoxicating liquors from any other state unless that state uses a given amount of grain from the first state, either in the manufacture of liquors or any other commodity, such as bread and the like. And it is possible to envision a situation where a state which manufactures bottles or barrels might prohibit the

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[2] This matter has been made the subject of "A Study in Economic Nationalism" with special attention given to state and local barriers to interstate commerce in the United States. The study was conducted by Dr. Frederick Eugene Melder and published in November, 1937, in the University of Maine Studies.

[3] The general nature of the state statutes during the period of the Articles of Confederation is thus stated in the study just cited: "These state-imposed restrictions and barriers had four different purposes in view: namely, retaliation against British restrictions on American shipping, acquisition of revenue for state treasuries, protection of domestic trade and industry, and discrimination or retaliation against commodities imported from neighboring states. The first three of these purposes were uppermost in the state commercial legislation during the early period of this era, but by 1785-1786 the regulations had been turned, in most if not all of the states, against the products, ships or merchants of sister states."

introduction of intoxicating liquors within its borders from all other states unless a quota, or possibly all, of such imported intoxicating liquors were marketed in locally produced bottles and barrels. There would seem to be no limitation upon the field in which such prohibitions might be made to operate. The importance of the attack upon the statute arises from the fact that the interpretation of the Twenty-first Amendment given by the court below in sustaining the statute would arm every state in the Union with an economic weapon to be used against those states which produce intoxicating liquors. From the point of view of those states the right to carry on interstate commerce in intoxicating liquors would be taken out of the Constitution and placed upon the auction block. There is something of sheer incongruity in the thought that while the United States is engaged, as a national policy, in endeavoring to compose differences and remove barriers in trade among the nations, the latest addition to our own Constitution should be interpreted by the lower court in such a manner as to make it possible for the states which make up our nation to throw up insurmountable trade walls and barriers against legitimate articles of commerce originating in sister states.

Nor is the issue presented here concerned solely with interstate traffic in alcoholic liquors and the economic interests of the appellants. The appellants are responsible members of the distilling industry and their economic interests are manifestly at stake; were the latter not so they might have no standing to complain of the Missouri statute. But we venture to suggest that something more is involved here: the public interest in the effective operation of the industry and its adequate control under the law. If the Twenty-first Amendment is to be construed in such a manner as to permit the erection of tariff barriers at state lines and the waging of trade wars among the states, fresh encouragement will be given to influences and agencies which in the past have flourished on extra-legal and unlawful practices. Bootlegging

will have been given a new start.

Even further and in a long view concerning matters less tangible but none the less real, the present issue touches a subject of wider public concern than the control of the liquor traffic. It tends to focus the minds of men on things that divide rather than those that unify. Animosities spring up and thrive and spread even where the division is on nothing broader than geographical lines. The world today furnishes abundant evidence of the animosities of division. In this country, it may be doubted whether any single provision of the Constitution has done as much as the Commerce Clause to forestall such animosities and to bring unity among the people of the states. No parochial philosophy underlies the Constitution; for "it was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in Union and not division."[4]

Constitutional Issue Not Foreclosed by Any Prior Decision

No state statute whose aim is simply retaliation in the interstate commerce field has ever, so far as we have been able to ascertain, been upheld by this Court. *State Board of Equalization* v. *Young's Market Company*, 299 U. S. 59 and *Mahoney* v. *Triner Corporation*, 304 U. S. 401 are not to the contrary. Both of those cases were concerned with statutes quite different from the Missouri Retaliation Statute involved here and neither of them is controlling in these cases.

Of the two only the *Young's Market Case* was concerned with a Commerce Clause objection to the state statute. In sustaining the statute, this Court pointed out that "the case does not present a question of discrimination prohibited by the Commerce Clause" (p. 62). Moreover, as the Court added, "in the light of history, we cannot say that the exaction of

[4] Mr. Justice Cardozo in *Baldwin* v. *Seelig*, 294 U. S. 511, 523.

a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing liquor traffic" (p. 63).

The *Tvriner Case* was decided on the sole contention that the state statute violated the equal protection clause. It is true that in the course of the opinion and in answer to the contention that "registered brands of other foreign manufacturers may be imported while its unregistered brands may not be, although 'identical in kind, ingredient or quality,'" the Court said "we are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic," and declined to do so, citing the *Young's Market Case*. But, aside from the fact that the Commerce Clause was not argued and hence was not a basis for the decision, we suggest that a similar statement to that made by the Court with reference to the California statute (in the *Young's Market Case*) might well be made with regard to the Minnesota statute (in the *Tvriner Case*), namely, that the state statute involved might, for all that was disclosed on the record and in history to the contrary, conceivably have been one in aid of policing the liquor traffic.

POINTS AND AUTHORITIES

I

Apart from the Twenty-first Amendment, the Missouri Retaliation Statute here involved violates the Commerce Clause of the Federal Constitution.

Constitution, Art. I, Sec. 8.

Farrand, Records of the Federal Convention, Vol. II, p. 308; Vol. III, pp. 478, 547, 548.

The Federalist, No. XLII.

Curtis, History of the Constitution, Vol. I, p. 502.

Story on the Constitution, Sec. 259.
Baldwin v. *Seelig*, 294 U. S. 511.
Cooley v. *Board of Wardens*, 12 How. 299.
South Carolina Highway Department v. *Barnwell Bros.*, 303 U. S. 177.
The License Cases, 5 How. 504.
Bowman v. *Chicago, etc. Ry. Co.*, 125 U. S. 465.
Leisy v. *Hardin*, 135 U. S. 100.
Gibbons v. *Ogden*, 9 Wheat. 1.
Brown v. *Maryland*, 12 Wheat. 419.
Mugler v. *Kansas*, 123 U. S. 623.
In re Rahrer, 140 U. S. 545.
Scott v. *Donald*, 165 U. S. 58.
Rhodes v. *Iowa*, 170 U. S. 412.
Clark Distilling Co. v. *Western Md. Ry. Co.*, 242 U. S. 311.
State Board of Equalization v. *Young's Market Co.*, 299 U. S. 59.
Wilson Act, 27 U.S.C.A., Sec. 121.
Webb-Kenyon Act, 27 U.S.C.A., Sec. 122.

II

The Missouri Retaliation Act involved in these cases is not saved by the Twenty-first Amendment. Nothing contained in that amendment validates such a statute as this nor gives to the States unlimited power to burden interstate commerce in intoxicating liquors.

Constitution, Twenty-first Amendment.
Knowlton v. *Moore*, 178 U. S. 41.
Evans v. *Gore*, 253 U. S. 245.
Selective Draft Law Cases, 245 U. S. 366.
Butler v. *Perry*, 240 U. S. 328.
Robertson v. *Baldwin*, 165 U. S. 275.
Slaughter House Cases, 16 Wall. 36.
Brown v. *Maryland*, 12 Wheat. 419.

Baldwin v. *Seelig*, 294 U. S. 511.
Rhodes v. *Iowa*, 170 U. S. 412.
Leisy v. *Hardin*, 135 U. S. 100.
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Scott v. *Donald*, 165 U. S. 58.
McCormick v. *Brown*, 286 U. S. 131.
Samuels v. *McCurdy*, 267 U. S. 188.
United States v. *Hill*, 248 U. S. 420.
Constitution, 18th Amendment.
Commonwealth v. *Stofchek*, 185 Atl. 840.
Wilson Act, 27 U.S.C.A., Sec. 121.
Webb-Kenyon Act, 27 U.S.C.A., Sec. 122.
49 Cong. Rec. 699.
S. J. Res. 211, 72nd Cong., 2nd Session.
76 Cong. Rec. 4170-4176.
Brown, Ratification of the Twenty-first Amendment.

ARGUMENT

I

Apart from the Twenty-first Amendment, the Missouri Retaliation Statute here involved violates the Commerce Clause of the Federal Constitution.

A. The Unwarranted Discriminations.

Article I, Sec. 8, of the Federal Constitution provides:

> "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The principal object sought to be attained by this provision of the Federal Constitution was the elimination of provincial barriers burdening commercial intercourse among the thirteen original colonies. History is replete with evi-

dence that the narrow and provincial restrictions erected by the various colonies against the importation of commodities moving in commerce from the sister colonies brought about as between them an unhealthy and undesirable situation.

Farrand, Records of the Federal Convention, Vol. II, p. 308; Vol. III, pp. 478, 547, 548;
The Federalist, No. XLII.
Curtis, History of the Constitution, Vol. I, p. 502;
Story on the Constitution, Sec. 259;
See also; Footnote 3, supra; p. 11.

Uniformly the Commerce Clause has been construed as prohibiting to the States the power to discriminate against commodities having their origin in sister states and moving in interstate commerce. As recently summarized by the Court, the clause "by its own force, probibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state." Underlying the stated rule, the Court added, "has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the State."[5] It is in this area of discrimination that the indispensable function of this Court comes into play to provide a check against state action where the normal processes of political pressure are not calculated to provide a corrective.

[5] *South Carolina State Highway Department* v. *Barnwell Brothers*, 303 U. S. 177.

Turning to the statute here challenged, we find by an examination thereof that the State of Missouri attempts to allocate to itself, in violation of constitutional principles which have obtained for many years, the power to determine the states of origin of intoxicating liquors which may or may not be brought within its borders. The sole test upon which admission or exclusion depends is whether the laws of the several states of origin comply or fail to comply with Missouri's definition of what it chooses to call discrimination.

Clearly, then, the statute is retaliatory and is of the type which would be prohibited under the Commerce Clause of the Federal Constitution except, as the lower court held, for the provisions of the Twenty-first Amendment. The effect of the lower court's decision is to bring back an evil long sought to be eradicated from our national life. The evil referred to is the practice, long condemned, of the liquor interests engaging in local politics.

There are eighteen states in the Union which have enacted laws that might be characterized under the Missouri statute as discriminatory. Doubtless Missouri producers hoped that by the enactment of the challenged statute and the consequent exertion of economic pressure upon the producers of intoxicating liquors within the offending states, they would cause the latter to bring about repeal of the supposed discriminatory statute in each of those eighteen states.

The result, however, was not as hoped for. Instead, legislation similar to the Missouri statute was introduced in the legislatures of eight other states. In only one other state, Michigan, was this type of legislation enacted. If, however, the power to enact this type of legislation with respect to intoxicating liquors is conceded to the states, an intolerable situation with respect to retaliation will arise, though to date reason has prevailed to keep this result at a minimum.

The chaotic situation which will result from the attempt of the states to regulate, in violation of the provisions of the Federal Constitution, the liquor traffic moving into their borders in the course of interstate commerce may be appreciated from an address made by Captain Alexander, Administrator of the Federal Alcohol Administration to the National Conference of State Liquor Administrators at their annual convention held at Mackinac Island in 1937. Speaking of such measures as that now before the Court, Captain Alexander said:

> "Such measures in the long run will be productive of conditions which tend toward chaos and will give rise to further and more violent measures on the part of other states affected thereby."

The discriminations arising from the Retaliation Statute do not, it should be noted, depend upon the quality of the products prohibited; nor do they depend upon a valid attempt to regulate or limit the total amount of liquor which may be imported into the State of Missouri; nor the imposition of any valid license or inspection fee upon the importation of appellants' intoxicating liquors. The discriminations are made to depend only upon the provisions of laws of other states as they relate to alleged burdens upon the importation into those states of intoxicating liquors manufactured in Missouri.

The type of state legislation with which we are here dealing was recently held invalid by this Court in *Baldwin* v. *Seelig*, 294 U. S. 511. While the New York statute in that case did not deal with intoxicating liquors moving in interstate commerce, the parallel between that case and the one at bar is too striking to be disregarded. In that case the constitutionality of the New York Milk Control Act (New York Laws of 1933, Ch. 158; Laws of 1934, Ch. 126) was challenged on the grounds, first, that it imposed an undue burden upon interstate commerce beyond the constitutional powers of the State of New York, and, second, that

it deprived the milk dealer in question of its property without due process of law. The statute, and the regulations adopted pursuant to it, undertook to prevent the sale of milk within the State of New York, brought in from other states, unless the price paid to the producers of the milk was one that would be lawful upon a like transaction within the State of New York. The argument presented to sustain the statute was that as well as providing for the economic welfare of the farmers of the state it served to assure the maintenance of a regular and adequate supply of pure and wholesome milk otherwise in jeopardy when the farmers of the state were unable to earn a living income. Coupled with this argument was one that farmers producing milk outside the state who did not receive an adequate price for their product were subject to the temptation to relax the rigid sanitary standards necessary to the production of a pure and wholesome supply of milk in the interest of personal economy.

Mr. Justice Cardozo, applying the constitutional tests by which such arguments are to be measured when attempt is made to bring such statutes within the power of the state, said at p. 521:

> "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed by an express prohibition of the Constitution, beyond the power of a state, 'except what may be absolutely necessary for executing its inspection laws.' Constitution, Art. I, §10, clause 2; *Woodruff* v. *Parham*, 8 Wall. 123. Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. I, §8, clause 3. 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' *International Textbook Company*

v. *Pigg*, 217 U. S. 91, 112; and see *Brennan* v. *Titusville*, 153 U. S. 289; *Brown* v. *Houston*, 114 U. S. 622; *Webber* v. *Virginia*, 103 U. S. 344, 351; *Kansas City Southern Railway Company* v. *Kaw Valley Drainage District*, 233 U. S. 75, 79. Nice distinctions have been made at times between direct and indirect burdens. *They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis.*" (Emphasis ours)

B. Limitations on the Police Power.

The object of retaliation against the laws of other states is not one which has ever been considered within the legitimate scope of the police powers reserved to the states. While the Commerce Clause has never been construed to be an absolute curb upon the powers of the states to enact laws pertaining to the health, safety and morals of their citizens, it has always been insisted that any state law affecting interstate commerce be enacted with some such object in view. Moreover, the effect upon interstate commerce must be neither unreasonable nor direct but merely incidental, and the regulation must pertain to matters of purely local concern upon which Congress has not seen fit to legislate.

In *The License Cases*, 5 How. 504, decided 1847, provisions of statutes of Massachusetts, New Hampshire and Rhode Island requiring persons importing wines from France and gin (in the case of New Hampshire) from Massachusetts to have licenses for that purpose were upheld. The statutes were attacked on the ground that they conflicted with the Commerce Clause of the Federal Constitution. The Court held that the statutes were mere internal regulations of the respective states, and, hence, were not passed in an attempt to regulate interstate commerce.

Here for the first time the power of the states to regu-

late the traffic in intoxicating liquors was called into question under the Commerce Clause. In this first test, nothing was decided except that the exercise of power questioned did not conflict with the Commerce Clause.

The next important case was *Bowman* v. *Chicago, etc., Railway Company*, 125 U. S. 465, decided in March, 1888. There plaintiffs claimed that under the Commerce Clause of the Federal Constitution an Iowa statute was void which forbade a common carrier to transport intoxicating liquors from outside the state into Iowa unless the shipper had first filed with the carrier a certificate showing he was authorized to sell intoxicating liquors in Iowa. The statute was held unconstitutional as an encroachment upon the power of Congress over interstate commerce. Chief Justice Field, writing for the Supreme Court in this case, stated:

> "* * * Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted."

Next, on April 28, 1890, came *Leisy* v. *Hardin*, 135 U. S. 100. The plaintiffs claimed that the Commerce Clause of the Constitution voided an Iowa statute which authorized the seizure of beer shipped to them in Iowa in interstate commerce from Peoria, Illinois. The Court upheld this contention upon the authority of *Gibbons* v. *Ogden*, 9 Wheat. 1 and *Brown* v. *Maryland*, 12 Wheat. 419. Chief Justice Fuller, writing for the Court, in speaking of the power to regulate commerce, declared at p. 108:

> "And while, by virtue of its jurisdiction over persons and property within its limits, a State may pro-

vide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject matter which has been confined exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by Congressional action."

And again, at p. 109:

"Hence inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled."

C. *Efforts to exempt intoxicating liquors from protection of Commerce Clause and the result thereof.*

The foregoing decisions demonstrate that up to 1890 state statutes prohibiting the importation of alcoholic beverages from outside the state were clearly unconstitutional as unreasonable burdens upon interstate commerce despite the fact that they were enacted pursuant to the police powers reserved to the states. A reading of these decisions and others, notably *Mugler* v. *Kansas*, 123 U. S. 623, demonstrates the struggle which had been going on for many years between the states in which sentiment was predominantly opposed to the liquor traffic and the Commerce Clause of the Federal Constitution in connection with the efforts of the former to prevent the importation of alcoholic liquors within their borders in furtherance of their own local prohibition policy. Up to this time, whenever the local "drys" persuaded their respective legislatures to enact laws in the furtherance of their objectives which encroached upon the power of Congress to regulate interstate commerce, this Court steadfastly adhered to the maintenance of the supremacy of the Federal power over interstate commerce and struck down as unconstitutional state

enactments found to conflict with that power.

The "dry" forces of the country, therefore, ultimately realized that state power effectively to prohibit the importation of liquor into the states which they controlled must impinge upon the commerce clause. They also realized that such power could only be obtained for the states by a relaxation of the effect of that clause. Hence they determined to take action to achieve their ends.

As a result, there was introduced in Congress in 1889 a bill known as the Wilson Bill. This bill was not passed, however, until August 8, 1890, several months after this Court's decision in *Leisy* v. *Hardin*, supra. The Court's suggestion in that decision to the effect that the solution of the problem was to have the Federal Government surrender to the states some part of its power to regulate interstate commerce was probably influential in bringing about the enactment of the Wilson Act in its final form. 27 U.S.C.A. §121. The text of the Wilson Act appears on p. 35.

This statute was the beginning of the process by which the Federal Government, in furtherance of its policy to permit the states to exercise their customary police powers with respect to the liquor traffic unhampered by the curbs which had previously been imposed upon the exercise of such powers, relinquished to such extent only its control over interstate commerce in intoxicating liquors.

The Act was declared constitutional by this Court and was held to give the states control of intoxicating liquors moving in interstate commerce upon their arrival in the hands of the consignees within the states.

In re Rahrer, 140 U. S. 545.

The Act, however, was not construed as being a complete surrender by Congress of its power to regulate the interstate traffic in alcoholic beverages. That power had been surrendered only to the extent necessary to allow the states free rein in the legitimate exercise of their police

powers with respect to interstate traffic in liquor. As was pointed out above in the discussion of the recent case of *Baldwin* v. *Seelig*, 294 U. S. 511, discrimination against the products of sister states is not an objective within the proper scope of the police powers reserved to the states. Accordingly, when South Carolina sought, pursuant to the Wilson Act, not to prohibit absolutely the importation of liquors as articles detrimental to the public welfare, but merely to prohibit the importation of liquors by others than state functionaries, the statute was declared to constitute an unlawful discrimination against the products of other states and so to be unconstitutional. *Scott* v. *Donald*, 165 U. S. 58, 100 (1897). By failing to prohibit absolutely the importation of all liquors, the legislature had recognized liquors as subjects of legitimate commerce. Nor had the prohibition against importation been made to depend on the purity or impurity of the liquors. The only objective to which the regulations could conceivably relate was discrimination against the liquors imported from other states, and this was not a legitimate subject for exercise of the police powers. And the Wilson Act, intended only to permit an unrestrained exercise of the police powers, did not save the statute. The remarks of Mr. Justice Shiras, speaking for the Court, are emphatic on this point (p. 100):

> "It is not a law purporting to forbid the importation, manufacture, sale and use of intoxicating liquors, as articles detrimental to the welfare of the State and to the health of the inhabitants, and hence it is not within the scope and operation of the act of Congress of August, 1890 [the Wilson Act]."

The "dry" battle had not as yet been won, however. The interpretation accorded the Wilson Act by this Court was not regarded as having sufficiently vested the states with control over the interstate shipment of alcoholic beverages. State prohibition had become quite a common thing after the enactment of the Wilson Act. In those states where pro-

hibition existed locally, difficulty was found in coping with the traffic in alcoholic beverages moving in interstate commerce. The Wilson Act had been so construed by the Court as to prevent the police power of the state from attaching to alcoholic beverages moving in interstate commerce until actual delivery of such alcoholic beverages to the consignee within the state whose laws sought to control such commodities.

Rhodes v. *Iowa*, 170 U. S. 412;

The result of this condition was that in 1913 Congress enacted the Webb-Kenyon Act. 27 U.S.C.A. §122. The purpose of this Act was to give to "dry" states, under certain circumstances, the power to control shipments of alcoholic beverages moving in interstate commerce while within their borders in accordance with their general prohibition policy. The text of the Webb-Kenyon Act appears on p. 35.

The constitutionality of the Webb-Kenyon Act was upheld by this Court in *Clark Distilling Company* v. *Western Maryland Railway Company*, 242 U. S. 311. An examination of the opinion of Chief Justice White in that case discloses that the purpose of the Act was to permit "dry" states to exercise the power to keep outside their borders intoxicating liquors which they had theretofore been unable to do because of the conflict with the Commerce Clause of the Federal Constitution.

Thus, the situation which existed under the Wilson Act, as set forth above in *Scott* v. *Donald*, 165 U. S. 58, 100 (1897), was not altered in the slightest by the enactment of the Webb-Kenyon Act, which, by its title, divested intoxicating liquors of their interstate character *in certain cases* (emphasis ours). Its only effect was to enable the states to exercise their police powers with respect to imported liquors still in the process of shipment as well as after reaching the consignees. *It did not undertake completely to divest intoxicating liquors of all protection under the Commerce Clause so as to legalize state regulation of im-*

ports for purposes other than those within the proper scope of the police powers. (See further, as to the legislative purpose of the Act, p. 37, fu.) That it was not the intention of Congress in enacting the law to do so, is manifest by this Court's decision in the *Clark* case, supra, wherein it was stated by Chief Justice White that the Act was to operate "so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling."

The intention of Congress was, therefore, to grant to the "dry" states the power to suppress the liquor traffic within their own borders under their police powers if they so chose, without the embarrassment of the bar of the Commerce Clause which had theretofore stood in the way of their accomplishing this result.

This continued to be the state of the law until the effective date of the Eighteenth Amendment to the Constitution. Then the liquor traffic became entirely prohibited as a matter of national policy.

This Court in *State Board of Equalization* v. *Young's Market Company,* 299 U. S. 59, declared that apart from the provisions of the Twenty-first Amendment to the Federal Constitution a statute of California imposing a greater license fee upon wholesale beer dealers for the privilege of handling imported beer than that imposed for the handling of domestic beer would create a direct burden on interstate commerce and would, therefore, be void. It requires little argument to show that the same result would necessarily follow as to the statute here challenged which arbitrarily discriminates against and prohibits the importation into the State of Missouri of liquors manufactured in certain states because Missouri sees fit to characterize the laws of those states discriminatory and not because Missouri in prohibiting such importations is attempting to further the social or economic welfare of its citizens under its admitted police power. No purpose is apparent in the statute to promote the public health, safety or morals of the citizens of Mis-

souri. No pretext is offered that the enactment falls within the state's power to protect the life, limb, or property of its citizens.

Conceding to Missouri the power attempted to be exercised concedes that it may, despite constitutional prohibition, levy such imposts, obstructions and burdens upon the interstate commerce in intoxicating liquors as it sees fit. It is not an enactment, as clearly appears from its face, to curb, regulate or prohibit the liquor traffic in Missouri. No purpose is apparent from the statute itself, or from anything else made to appear on the record, that the importation into Missouri of intoxicating liquors will in any way be decreased by the operation of the statute. Liquors, manufactured in states upon which the ban of the statute does not fall, may flow into Missouri as freely as before and from aught that appears may flow more freely to take up the slack created by the prohibition placed upon the states in which discriminations are said by Missouri to exist. Rather, the statute represents a long step back toward that destructive commercial strife among the various states which the Commerce Clause of the Constitution was designed to eliminate.

The foregoing discussion clearly demonstrates that apart from the Twenty-first Amendment the statute here challenged is an unconstitutional attempt by the State of Missouri to bar intoxicating liquors from its borders based solely on retaliation. We now proceed to demonstrate that the statute is not saved by the Twenty-first Amendment.

II

The Missouri Retaliation Act involved in these cases is not saved by the Twenty-first Amendment. Nothing contained in that Amendment validates such a statute as this nor gives to the States unlimited power to burden interstate commerce in intoxicating liquors.

It is our position that the Twenty-first Amendment cannot properly be construed as restoring the states to the position they occupied prior to the adoption of the Constitution and as thus removing the Commerce Clause *in toto* as a limitation upon their powers to deal with interstate commerce in intoxicating liquors. Affirmatively, it is our position that the effect of the Amendment upon the powers of the states over interstate commerce in intoxicating liquors is coextensive with the effect of the Webb-Kenyon Act and that it establishes in the Constitution itself the powers available to the states under that Act in furtherance of the prohibition policies of states. Properly construed, the Amendment imparts no validity to the Missouri statute here involved.

In endeavoring to support that position we invoke the time-honored method of this Court in interpreting the Constitution, namely, to give full consideration not only to the language but also to the purpose of the provision in question.[6] Conformably to that method we will divide our argument on the effect of section 2 of the Twenty-first Amendment into two parts concerned, respectively, with the language of the section and with the purpose for which those words were added to the Constitution. The two parts are not wholly distinct, but such overlapping as may arise will not interfere with their separate presentation.

A. *The language of the Twenty-first Amendment*

It is with section 2 that we are principally concerned

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[6] "The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning."—White, J., in *Knowlton* v. *Moore*, 178 U. S. 41, 95 (1899). "This rule is as applicable to the Amendments as to the provisions of the original Constitution."—Van Devanter, J., in *Evans* v. *Gore*, 253 U. S. 245, 260 (1920).

and it reads as follows:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The words of this section do not permit the construction that transportation of intoxicating liquors into a state contrary to "*any*" law of the state is prohibited. A limitation in respect of the kind of laws involved appears on the face of the section itself. The section, it will be noticed, does not say that transportation of intoxicating liquors into a state in violation of the laws thereof is prohibited. What it does say is that transportation of intoxicating liquors into a state "*for delivery or use therein*" in violation of the laws thereof is prohibited. The words "for delivery or use" cannot be ignored. They must be given effect. It is, then, the laws of a state with regard to delivery and use which are in the contemplation of the Amendment. "Delivery" and "use" thus become pivotal words in the construction of the Amendment. If it be thought that they are all-inclusive (that no transportation can be conceived of which does not involve either delivery or use) the reply is that they have acquired a meaning in the course of the long struggle over prohibition and that the Amendment must be read in the light of those meanings. What those meanings are will be developed more fully in a later part of this brief (p. 40). It is enough to suggest here that they are concerned with the social aspects of the traffic in intoxicating liquors and have no relationship to traffic and trade rivalry aspects.

Even if it be assumed that the words of section 2 are broad enough to prohibit the transportation of intoxicating liquors into a state contrary to "*any*" law thereof without regard to the character or purpose of that law, it does not follow that such a broad effect can be given to the Amendment. However comprehensive the words of an Amendment may be, it is settled that the effect of the Amendment may be less comprehensive, dependent upon the purpose for

which it was designed and adopted. Exceptions must be carved out of the comprehensive coverage, when the history of the Amendment shows them not to be within its purpose. It would be difficult to find more sweeping language than the words of the Thirteenth Amendment prohibiting involuntary servitude. Yet, notwithstanding the fact that the Amendment itself carried an express exception,[7] other exceptions were implied so as not to destroy historical powers and practices not deemed to be within the evils aimed at by the Amendment. Thus involuntary servitude has been enforced in the armed forces of the nation, *Selective Draft Law Cases*, 245 U. S. 366 (1918); on public highways of a State, *Butler* v. *Perry*, 240 U. S. 328 (1916); and on privately owned ships, *Robertson* v. *Baldwin*, 165 U. S. 275 (1897).

The rule for implying these historical exceptions is especially applicable when not to imply them will work a substantial change in the general scheme of government under the Constitution as a whole. In the *Slaughter House Cases*, 16 Wall. 36 (1873), this Court, while admitting that the argument is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument, declared that when the consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions as to radically change the theory of the relations of the State and Federal Governments to each other and of both to the people, the argument has a force that "is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt." (p. 78).

The "oppressed and degraded state of commerce previous to the adoption of the Constitution" was noted by this Court long ago. And it may be doubted, said Chief

[7] "except as a punishment for crime whereof the party shall have been duly convicted."

Justice Marshall, "whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." *Brown* v. *Maryland*, 12 Wheat. 419, 445 (1827).

More recently, when one state sought to establish a barrier against the products of a sister state, this Court struck the barrier down, saying that the Constitution "was framed under the dominion of a political philosophy less parochial in range" than would justify such state action. It was, moreover, declared to be "ultimate that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." The Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *Seelig*, 294 U. S. 511 (1935).

In the light of these principles of construction, and with these fundamental objectives of the Constitution, especially as illustrated by the Commerce Clause we turn to the purpose of the Twenty-first Amendment as showing that the second section thereof cannot be rightly construed as bringing about the result on the basis of which this case was decided below, namely, that so far as intoxicating

liquors are concerned "the nation again is in that same situation in which it was as to all commerce before the adoption of the Constitution."

B. *The purpose of the Twenty-first Amendment*

The purpose of Section 2 was to write into the Constitution the effect of the Webb-Kenyon Act and thus furnish a permanent basis upon which "dry" states could protect themselves against the inflow of intoxicating liquors. This becomes clear from a consideration of the history of the Amendment and its relationship to the liquor problem with which the country has struggled for at least half a century. More particularly, the proof is established by a consideration of the evils which led up to and called the Amendment forth and which it was designed to correct; the origin and legal effect of the language in which it was framed; the ends for which it was submitted by Congress; the expectations with which it was received in public opinion and the purposes for which it was ratified by conventions in the states. The first and second of the matters of proof just mentioned will be considered together, inasmuch as the origin of the languag is to be found in the legislative efforts to deal with the evils which antedated the Twenty-first Amendment.

1. *Antecedent evils—Origin of language of Section 2.*

The Webb-Kenyon Act is the predecessor, if not precisely the prototype, of Section 2 of the Twenty-first Amendment. Its legislative history is illuminating. The avowed purpose of the Webb-Kenyon Act in 1913 was to carry a step further what Congress had undertaken to do in the Wilson Act in 1890, namely, to enable "dry" states to protect themselves against the inflow of liquors, particularly from "wet" states. *Rhodes* v. *Iowa*, 170 U. S. 412 (1898), in holding that "arrival" in the Wilson Act meant "delivery to the consignee," had opened the gates for a

flood of liquors to pour into "dry" states in the form of mail order and express shipments direct to the consignees. Delivery to the consignee thus being deemed to be within the protection of the Commerce Clause and untouched by the Wilson Act, new pressure was put on Congress by the prohibition forces to remove this protection also. All of which produced the passage of the Webb-Kenyon Act. There can be no question but that this matter of delivery in "dry" states was the specific evil with which Congress was dealing. And "delivery" (as has already been noted, p. 30) is one of the two pivotal words employed in Section 2 of the Twenty-first Amendment.

But though the purpose of the Webb-Kenyon Act was to carry the Wilson Act a step further, it was framed in terminology altogether different from the Wilson Act. For convenience in comparison, the two Acts are printed here in parallel columns:

Wilson Act

26 Stat. 313, 27 U.S.C. 121

August 8, 1890

"An Act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases.

"All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Webb-Kenyon Act

37 Stat. 699, 27 U.S.C. 122

March 1, 1913

"An Act divesting intoxicating liquors of their interstate character in certain cases.

"The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

The Wilson Act, it will be noted, is of unusual statutory form. It prescribes no rule of conduct. It imposes no duty. It provides no penalty. It was the method by which Congress undertook to give effect to the suggestion made in *Leisy* v. *Hardin*, 135 U. S. 100 (1890) that the reason Iowa could not, in that case, stop the sale of intoxicating liquors in original packages was because Congress had not given its consent for such state action. The declaratory language of the Wilson Act was Congress' consent to the states to apply their own prohibition laws to intoxicating liquor from other states notwithstanding that it was still in the original package. The Wilson Act thus constitutes an example of consent given by Congress for state action.

The Webb-Kenyon Act, on the contrary, is a prohibitory act. Unlike the Wilson Act, the text of the Webb-Kenyon Act is a direct prohibition by Congress of inter-state transportation of intoxicating liquors in certain circumstances. But there is not the slightest doubt that Congress in passing that Act intended to put "dry" states in a position to protect themselves against incoming liquors. The steps by which it was decided to employ the prohibitory language in the Webb-Kenyon Act rather than the consent language of the Wilson Act presents a striking case of legislative action built largely on a single word—the word "divest"—used by this Court in sustaining the Wilson Act.[8]

The original Senate Bill which became the Webb-Kenyon Act contained two sections. The first section survived as the total text of the Act.[9] The second, which was framed

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[8] "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."—*In Re Rahrer*, 140 U. S. 545, 562 (1891).

[9] Technically there was a slight change in Section 1. Just before the final passage of the Bill in the Senate, the text of the companion Bill which had been perfected and passed by the House was substituted for the language of the Senate Bill. This substitution accomplished two things: it brought about the perfecting amendments which the Senate desired to include and it expedited the acceptance of the Senate Bill by the House.

along the lines of the Wilson Act was killed in the Senate. The two sections were complementary: In the first, Congress proposed to exercise its power to throw a protection around "dry" states; and in the second, Congress proposed to give its permission (in the language of the Wilson Act already approved by the Court) to the states to protect themselves. Strangely enough, the Senate appeared to be of the opinion that Section 2, even though it followed the Wilson Act, went too far in its enabling effect and might be held invalid as a delegation of power.[10] So that section was killed.[11] Then something happened to the title of the Bill. The original title was "A Bill to prohibit interstate commerce in intoxicating liquors in certain cases," but on a motion by Senator Gallinger it was amended to read, "A Bill divesting intoxicating liquors of their interstate character in certain cases." With that title, and with only the text contained in the original first section, the Bill was accepted by the House. It was vetoed by President Taft on

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[10] 49 Cong. Rec. 702 and passim.

[11] There appears to be no basis for the contention, sometimes made, that the reason for the abandonment of the section modelled after the Wilson Act was in order to enable the states to discriminate at will against other states. The Wilson Act provided that a state could exercise its police powers against out-of-state liquors "in the same manner as though such liquids or liquors had been produced in such State." The purpose of the Act was to break down the distinction between in-state and out-state liquors. No doubt it was assumed, if not actually intended, that equality or uniformity of treatment would follow. See *Scott* v. *Donald*, 165 U. S. 58, 100 (1897). And the Court has emphatically declared that "the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Act are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other."—White, C. J. in *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 330 (1917).

the basis of an opinion by the Attorney General that it involved an unconstitutional delegation of legislative power to the states;[12] but it was repassed by both Houses and became law on March 1, 1913.

The Webb-Kenyon Act, then, by its title is a "divesting" statute and by its text a congressional prohibitory statute. And in the *Clark Case* it was said that the movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law had been "in express terms divested by the Webb-Kenyon Act of their interstate commerce character."[13] In such fashion was the theory of the Wilson Act, crystallized in the word "divest" in the *Rahrer Case*, carried over via the title into the Webb-Kenyon Act and sustained by the Court. In substantial effect, the expanded operation of the Wilson Act had been secured notwithstanding the expunged second section of the Webb-Kenyon Bill. At last the states were enabled to stop the incoming flow of liquors—to stop it at the borders if that were deemed necessary in order to check the "wet" invasion of "dry" states.

From the point of view of the states, their power of self-protection was established by the Webb-Kenyon Act as interpreted and sustained in the *Clark Case*. But from their point of view also, it is necessary to keep two other things in mind. First, their self-protective power rested, not on the firm and permanent basis of constitutional authority, but on the consent of Congress; and the consent which Congress had given by statute, Congress could take

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[12] 49 Cong. Rec. 4291.

[13] Nowhere was there a suggestion that the process of "divesting" had removed intoxicating liquors altogether from the protection of the Commerce Clause. The title of the Webb-Kenyon Act was limited to divesting "in certain cases." "Divest," as shown by its use in the *Rahrer* case, was merely a figurative way of expressing the legal result that Congress had given its consent to the states to apply their "police" laws to incoming out-of-state liquors.

away. Second, the constitutional foundation of the Webb-Kenyon Act was itself not beyond dispute: the Attorney General had rendered an opinion against its validity; the President had vetoed it on the ground that it was unconstitutional; the Court had been divided in sustaining it.

The Eighteenth Amendment did not affect this situation. It neither repealed nor impaired the operation of the Webb-Kenyon Act. *McCormick & Co.* v. *Brown*. 286 U. S. 131 (1932). It left the states with their powers intact over intoxicating liquors except, of course, that they could not affirmatively legalize the traffic.

Along with the movement against the Eighteenth Amendment there grew the conviction that repeal should be accompanied by some provision for protection of the states. It found expression in the 1932 platforms of the two principal political parties, both of which coupled repeal with the protection of the states. (See Appendix, p. 20).

The Twenty-first Amendment originated in the Senate, and some of the Senators who participated in the passage of the Webb-Kenyon Act participated in the debate on the Twenty-first Amendment—notably Senator Borah. The senatorial debate on the submission (noted and discussed later, p. 42 et seq.) leaves no room for doubt that the Senate was concerned with the same problem with which it had been concerned in considering the Webb-Kenyon Act. That problem, it will be recalled, was the inability of a "dry" state to stop delivery of liquors to consignees within the state.

That the language of Section 2 of the Amendment, in the light of all these circumstances, followed that of the Webb-Kenyon Act was not surprising. It would have been surprising if language essentially different had been chosen. But nowhere does the similarity become so compelling as in a statement on the floor by Senator Sanders, who had been associated in the drafting of the Webb-Kenyon Bill and was actively in charge of it in the Senate, that if the Bill were stripped of unnecessary verbiage it would read: "That the shipment of intoxicating liquor from one State into any

other State by any person, to be received or used in violation of any law of such state, is hereby prohibited." (49 Cong. Rec. 699) For convenience of comparison, that paraphrase of the Webb-Kenyon Act and the second section of the Twenty-first Amendment are printed here in parallel columns:

Webb-Kenyon Act (Paraphrase)	Twenty-first Amendment (Section 2)
"That the shipment of intoxicating liquor from one State into any other State by any person, to be received or used in violation of any law of such State, is hereby prohibited."	"The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Reference has already been made (p. 30) to the pivotal words, "delivery" and "use," and that they had acquired a statutory meaning. The meaning is revealed by a consideration of the purposes for which the words were employed. "Delivery" is not found in the Webb-Kenyon Act, but the antecedent idea occurs in the words "to be received, possessed, sold * * *." The draftsman of the Amendment, pursuant to the general scheme of the Constitution not to particularize, undertook to phrase the Amendment in terms more general than the Webb-Kenyon Act. This is shown, for example, by the omission of four of the five adjectives in the descriptive part of the Webb-Kenyon Act ("spirituous, vinous, malted, fermented or other intoxicating liquor") and the employment of the last alone, namely "intoxicating," with its comprehensive meaning under the Eighteenth Amendment. Moreover, the enforcement of the Webb-Kenyon Act involved a subjective inquiry: whether the liquor was "intended by any person interested therein to be received, possessed, sold, or in any manner used * * * in violation" of state law. The difficulties of proof of such intent were frequently referred to in the debate on that Act. But those difficulties were obviated, and at the same time the

application of the Amendment made more objective, by the omission of the element of intent. The use of the word "delivery" not only carried the process of simplification one step further but it adequately covered, and thus enabled the states to deal with, the principal problem which had vexed them since the *Rhodes Case.*

"Use" is taken directly from the Webb-Kenyon Act. It is related to a problem of state power not so acute as that involved in "delivery," but yet one of potential importance, viewed in the light of the prohibition movement before and shortly after passage of the Webb-Kenyon Act. In the zeal to cope with the prohibition problem some of the states, as well as Congress, had passed statutes which interfered with the possession or transportation of intoxicating liquors even for personal use.[14] The ultimate legislative object of prohibition, declared Chief Justice Taft, "is to prevent the drinking of intoxicating liquor by any one because of the demoralizing effect of drunkenness upon society. The State has the power to subject those members of society who might indulge in the use of such liquor without injury to themselves to a deprivation of access to liquor in order to remove temptation from those whom it would demoralize and to avoid the abuses which follow in its train." *Samuels* v. *McCurdy,* 267 U. S. 188 (1925), sustaining a Georgia law of 1907 prohibiting possession. And see *United States* v. *Hill,* 248 U. S. 420 (1919), sustaining the Reed Amendment prohibiting interstate transportation for personal use.

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[14] This phase of the problem is amply illustrated by the frequent, but always unsuccessful efforts, in the course of the consideration of the Webb-Kenyon Act to amend it so as to exclude from its operation the transportation of intoxicating liquors for personal use. In opposition to these proposed amendments it was sometimes stated that while there was no general expectation that the several states would prohibit the personal use of intoxicating liquors, nevertheless if the states did desire to do so, their power to effectuate a policy to that effect would be implemented by the Webb-Kenyon Act.

The aim of the Webb-Kenyon Act was to put "dry" states in a position to deal with all phases of the liquor problem that could arise in a state committed to a policy of prohibition. That Act was concerned with social, not tariff and trade-rivalry, problems. And it was still a social problem which Congress was considering when late in 1932 it took up the question of submitting a new amendment to the states on the subject of intoxicating liquors.

2. *Submission by the Congress.*

The sole question which Congress, by Section 2 of the Twenty-first Amendment, intended to submit to the states for their determination, was whether those states which wished to remain "dry" after the repeal of the Eighteenth Amendment should be protected in their desire by a permanent constitutional provision. No issue—viewing the issue as it was viewed by the Congress—was presented as to how much protection, if any, ought to be accorded to "wet" states against the importation of rival liquor from other "wet" states.[15]

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[15] S. J. Res. 211, which ultimately became the Twenty-first Amendment, was introduced by Senator Blaine and referred to the Judiciary Committee Dec. 6, 1932. It was reported out with amendments Jan. 6, 1933, namely, to strike out all after the resolving clause and insert four sections: (1) to repeal the Eighteenth Amendment; (2) for the protection of the states—the form in which it was finally ratified; (3) to give Congress concurrent power over the saloon; (4) to provide for ratification by legislatures within seven years. Of these, Secs. 1 and 2 remained intact; Sec. 3 was stricken out, 76 Cong. Rec. 4179; Sec. 4 was amended by substituting "conventions" for "legislatures," 76 Cong. Rec. 4169. A motion by Senator Robinson to strike Sec. 2 was withdrawn on the basis of an argument by Senator Borah that that section was necessary in order to insure the permanency of the Webb-Kenyon doctrine. As so amended, the Resolution passed the Senate Feb. 16, 1933 (76 Cong. Rec. 4231), and the House Feb. 20, 1933 (76 Cong. Rec. 4516). Excerpts from the Congressional debate on Sec. 2 are included in Appendix A, (p. 2 et seq.). The arrangement is chronological.

Section 2 received careful consideration and full explanation during the Congressional debates. It was one of the focal points of the controversy over submission. But while the issue was sharply drawn as to whether Section 2 should be included in the proposal to be submitted to the states, no disagreement was expressed as to what the effect would be if the proposal were ratified.

The unanimity of legislative opinion as to the effect of Section 2 is nowhere better illustrated than in the consideration given to the motion by Senator Robinson that Section 2 be stricken out of S. J. Res. 211. Senator Borah spoke in opposition. He based his insistence upon the retention of Section 2 squarely upon the uncertainty of the protection afforded to "dry" states so long as the Webb-Kenyon Act remained merely a statute. This uncertainty, he argued, was due to two factors, one, the doubtful constitutionality of the Webb-Kenyon Act, with the consequent possibility that it might still be nullified by this Court; and two, the fact that the Webb-Kenyon Act did not represent a settled legislative policy and therefore might be repealed by the Congress:

> "Mr. President, it has been said that the Webb-Kenyon Act is a sufficient protection to the dry States. The Webb-Kenyon Act was sustained by the Supreme Court of the United States by a divided court. The President of the United States—President Taft, who was afterwards Chief Justice—vetoed it on the ground that it was unconstitutional. The Attorney General of the United States rendered an opinion to the effect that it was unconstitutional. Elihu Root, when in the Senate, argued that it was unconstitutional. Mr. Justice Sutherland, who is now upon the Supreme Bench, argued before the Senate that it was unconstitutional. Therefore, Mr. President, we are turning the dry States over for protection to a law which is still of doubtful constitutionality and which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it. Secondly, we are asking the dry States to rely upon the Congress of the

United States to maintain indefinitely the Webb-Kenyon law.

> "It will be recalled that at the time the decision of the Supreme Court was made with reference to the Webb-Kenyon Act immediately thereafter there began a campaign upon the part of those interested in the liquor traffic to secure one of two things—either a repeal of the Webb-Kenyon Act by act of Congress or a reconsideration in the court. Thus, at the time of the adoption of the eighteenth amendment, that was an unsettled problem. It had not become, and never has become—except in the sense that now, since the adoption of the eighteenth amendment, it has not been contested as it otherwise would have been—it never has become a settled policy of the Government or a settled policy of the Congress and, it seems to me, could not be accepted as a sufficient protection to the dry States." (76 Cong. Rec. 4170; see also Appendix A, p. 11).

At the conclusion of Senator Borah's remarks, during which he had outlined the struggle of "dry" states to prevent importations of liquor into their territory, and reviewed the decisions of this Court upon legislative efforts in that direction, Senator Robinson voluntarily withdrew his motion. The colloquy which followed is significant. Senator Borah said:

> "All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently in the Constitution of the United States." (76 Cong. Rec. 4172; see also Appendix A, p. 12).

That this interpretation of Senator Robinson's action in withdrawing his motion was correct is apparent from his own remarks and those of Senator Wagner:

> "Mr. WAGNER. In view of the inquiry made, I may say to the Senator that I have made a study of the history of these decisions to which he has been referring, and it is on account of those decisions, so far

as I am concerned, that if the dry States want additional assurance that they will be protected I shall have no objection.

"Mr. ROBINSON of Arkansas. Mr. President, I had that thought myself. I do not wish to ask the Senate to put itself in the position of denying any measure of protection to dry territory." (76 Cong. Rec. 4171; see also Appendix A, p. 12).

Senator Borah was a member of the Judiciary Committee, to which S. J. Res. 211 had been referred, and in which it had been amended. As one, therefore, who shared responsibility for the exact language of Section 2, his remarks as to its intended effect have added weight. The further fact that he was among the supporters of the original Webb-Kenyon Act and familiar with its language as against the language of Section 2, makes his interpretation a persuasive one.

Why the exact language of the Webb-Kenyon Act was not copied into Section 2 of the Twenty-first Amendment is suggested by the numerous criticisms of Section 2 upon the ground that it represented a statutory type of regulation rather than one which should properly be embodied in the Constitution. Senator Walsh of Massachusetts had read into the record three statements opposing upon this very ground the resolution as it had been reported out of the Judiciary Committee. One of the statements was by the President of the Association Against the Prohibition Amendment, (Appendix A, p. 7), and one by the co-author of the repeal plank in the Democratic platform, (Appendix A, p. 8). The third statement is contained in an editorial which summarized the criticism succinctly as follows:

"The Committee, ignoring the existence of the Webb-Kenyon Act, which gives this 'protection,' added another clause, which was not a constitutional enactment but simply federal legislation prohibiting the transportation or importation of alcoholic liquors from wet to dry states. Thus * * * the Committee * * * imbedded in the Constitution, which should be a state-

ment of fundamental principles in government, an offensive form of sumptuary legislation." (76 Cong. Rec. 4176; see also Appendix A, p. 13).

It may be assumed that it was in deference to this strong sentiment against the inclusion in the Constitution of minute regulations of the type customarily found in mere statutes, that a form of Section 2 embodying only thirty-one words, as against the 154 words appearing in the Webb-Kenyon Act, was adopted.

The remarks of Senator Blaine, who was the author of S. J. Res. 211 in its original form, and who was in charge of the Judiciary Committee's Amendment during its passage through the Senate, provide equally strong evidence on what the intention of Congress was as to the effect of Section 2. His original Resolution had prohibited the introduction of liquor into any state "for use therein in violation of its laws," "if the laws in force therein prohibit such transportation or importation." The final Resolution itself prohibited the transportation or importation into any state "for delivery or use therein * * * in violation of the laws thereof." Senator Blaine, however, had no quarrel with the change of language made by the Committee. He treated the new language as the exact equivalent of the old:

> "Mr. President, in agreeing to that section, I think the committee was unanimous in agreeing that the language used would effectuate the purpose that is obviously designed by Section 2." (76 Cong. Rec. 4140, see also Appendix A, p. 8).

Senator Glass offered as a substitute for S. J. Res. 211 another Resolution also couched in terms of prohibiting the importation of liquor into states which *prohibited* its manufacture, sale or transportation. (See Appendix A, p. 15). But in spite of numerous opportunities to point out wherein the language of his Resolution differed in effect from the language of Section 2 of S. J. Res. 211, Senator Glass failed to do so. On the contrary, he compared his Resolution to

the other and intimated that the effect of the two different types of language would be identical.[16]

No changes were made in the form of the Resolution adopted by the Senate during its passage through the House. Remarks by members of the House were general and in conformity with the views expressed in the Senate as to the effect of Section 2. They were variously phrased: the purpose of the Twenty-first Amendment was to keep the "dry" states "dry"; the fundamental law and basic structure of the Government as it existed prior to the Eighteenth Amendment would be restored; the Twenty-first Amendment would injure the permanence of the Webb-Kenyon Act without changing its effect.

Despite the lengthy and careful debates over Section 2 as to whether it should be included in or excluded from the Twenty-first Amendment, the effect of that Section was thoroughly understood by the legislators on both sides of the question as simply making permanent the protection of "dry" states in the manner of the Webb-Kenyon Act. The problem of what one "wet" state could do with regard to rival liquor coming from other "wet" states was not even seen by the Congress, much less debated by it, and assuredly, therefore, not submitted by it to the states for their determination.

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[16] During the debate over Senator Glass' substitute Resolution, he said: "So I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation and sale of liquors" (76 Cong. Rec. 4219; see also Appendix A, p. 15). This statement standing alone and unexplained without any disclosure of the source of the objection referred to, its character, or its target, is the only intimation, apart from some equally vague remarks by Representative Lea (See Appendix A, p. 15) that Congress or any of its members even perceived the possibility of the Twenty-first Amendment affecting shipments of liquor from one wet state into another.

3. *Public opinion and ratification.*

Public opinion, manifested officially in conventions for the ratification of the Twenty-first Amendment as well as unofficially, attributed to that Amendment no purpose to restore the nation to a pre-constitutional era of trade wars in intoxicating liquors. No leave was meant to be given "wet" states to discriminate between rival liquors coming from other "wet" states. The popular movement was concerned with the social problem of prohibition, and such expression of opinion as there was, apart from sentiment urging repeal of the Eighteenth Amendment, favored federal aid and insulation against intoxicating liquors only for states continuing for themselves a genuine policy of prohibition after the termination of national prohibition.

The platforms of both major political parties in 1932, in response to popular demand, contained planks favoring the repeal of national prohibition, but neither party advocated, after its repeal, a greater abatement of the Commerce Clause than had been effected by the Webb-Kenyon Act. The Democratic plank, after urging repeal, demanded "that the Federal Government effectively exercise its power to enable the States to protect themselves against importation of intoxicating liquors in violation of their laws." The Republican plank added the desire that the Federal Government "safeguard our citizens everywhere from the return of the saloon and attendant abuses." (Appendix B, p. 20.)

At the first Congressional session thereafter, the Resolution which was to become the Twenty-first Amendment was adopted. The New York Times commented editorially: "The second section maintains, constitutionally, the protection of States which wish to remain Dry from importation of intoxicating liquors from other States." The Christian Science Monitor observed that "Section 2 . . . would put into the Constitution the essence of what is now statu-

tory law under the Webb-Kenyon Act." That is the pith of a sampling of editorial comment about Section 2: it put the Webb-Kenyon Act into the Constitution. Seen as so doing, it was viewed, variously, as an "unnecessary clause" or as a constitutional guarantee against repeal by Congress of the Webb-Kenyon Act. For other editorial comments, see Appendix B, p. 21 et seq.

Opinions by the leaders, both for and against the repeal of the Prohibition Amendment, were in agreement that Section 2 merely put the substance of the Webb-Kenyon Act into the Constitution. Thus, on the one side it was observed that "The section which writes the Webb-Kenyon Act into the Constitution is unnecessary." And on the other side, that the repeal amendment "will return conditions as they were before the Eighteenth Amendment was adopted." Lay opinion, it is clear, considered Section 2 as doing no more than to bring the country back to pre-Prohibition days. Not even a suggestion has been found (in as full a sampling of contemporary newspaper comment as is available in New York City) to indicate the existence of any opinion anywhere that the states would be restored to the position they occupied before the adoption of the Constitution. See further, Appendix B, p. 21 et seq.

Comments in legal periodicals unanimously express the opinion that Section 2 did no more than put the Webb-Kenyon Act into the Constitution. As expressed by one writer, it "merely confirms the state of the law at the time national prohibition went into effect." For further legal comments, see Appendix B, p. 23 et seq.

Official expression of public sentiment on the Twenty-first Amendment is found in the proceedings for its ratification. An examination of the legislation which provided for the calling of ratifying conventions, of the ballots by which the delegates thereto were chosen, and of the jour-

nals of the conventions themselves[17] discloses no purpose whatever to relieve the states altogether from the limitations of the Commerce Clause after repeal of the Eighteenth Amendment.

The question put to the people for their determination through the ratification conventions was essentially whether the Eighteenth Amendment should or should not be repealed. In twenty-two states, or more than half of those which ratified the Amendment[18], the statutes were special in character (*i.e.*, were concerned only with conventions to pass on the question of repealing the Eighteenth Amendment) and most of the ballots for the election of delegates presented to the voters only the alternatives (usually printed in boldface type): "FOR REPEAL" or "AGAINST REPEAL." No question was presented of repealing anything more than national prohibition or of going further back in time than the period immediately preceding the adoption of the Eighteenth Amendment. Certainly, a restoration of the liquor problem to the pre-constitutional era of trade wars between the Colonies was not even posed as a possible alternative.

Repeal was the only expressed purpose of most of the conventions, and in some it was specifically declared to be

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[17] Most of the Journals of the conventions' proceedings have been collected in the library of the School of Law of Columbia University. More recently the Journals have been made available in a single volume compiled by Professor Everett S. Brown, of the University of Michigan, and published by the University of Michigan in 1938, under the title, "Ratification of the Twenty-first Amendment to the Constitution of the United States." In the few instances where Journals either were not kept or were not obtainable, Professor Brown has inserted press reports of the convention proceedings. Page references herein to that volume will be indicated thus: (Brown, p.)

[18] The Twenty-first Amendment was ratified by 38 states; South Carolina was the only State which voted upon it in convention and rejected it.

the sole purpose. In the process of organizing the conventions, something of a common purpose is disclosed, namely, to give the principal positions to delegates who had been conspicuous in the fight for the repeal of the Eighteenth Amendment. The titles of the Journals, the language of debate, the mode of summing up the results, the forms for certifying the action taken—all were largely in terms of repeal. The conventions were in truth, as the Journal of at least one described it, "repeal conventions." (Brown, p. 95.)

Section 2, on the total record of all the conventions, is specifically referred to but once. This single reference appears in the Journal of the Idaho Convention as follows: "Repeal of the Eighteenth Amendment is now assured. This means that those who traffic in liquor across state lines which have dry laws may and will be prosecuted in the Federal courts as provision is made in the Twenty-first Amendment that 'the transportation and importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited.' " The reference is of interest, and not without significance, because of the speaker's assumption, if not his explicit statement, that federal protection was to be accorded not to the states generally, but to states *"which have dry laws."*

Though the record is nearly barren on the subject of Section 2, it is fairly full on the intended consequence of the repeal of the Eighteenth Amendment. The purpose was to undo what had been done in 1919, to withdraw the grant of "police power" to Congress to legislate concerning intoxicating liquors, to destroy the policy of national prohibition, and to restore the states to their position before what was called the "tragic mistake" of adopting the prohibition amendment—all this being summed up in a single word, "repeal." Governor Lehman, calling the New York Convention to order pursuant to the statute, spoke of "the fight to regain that balance between state and na-

tion which is guaranteed by the Constitution of the United States," (Brown, p. 297), and James W. Wadsworth, on being presented to the Convention after his election as first Vice-president, expressed the opinion that when repeal shall have been consummated "we shall have restored to the people of the States that power to govern their own affairs which was unwisely in a moment of hysteria taken away from them back in 1918." (Brown, p. 306)

Summarizing, then, the official records of the ratification of the Twenty-first Amendment, the purposes of the people in adopting that amendment appear to have been:

1. To repeal the Eighteenth Amendment. On this the conventions were vocal and explicit.

2. To return the liquor problem to the states to be handled by them under a legal situation such as existed prior to the adoption of the Eighteenth Amendment, but not such as existed prior to the adoption of the Constitution itself. This was to some extent explicit, though for the most part it was implicit, in the argument for repeal. Apart from such statements as those of Governor Lehman, quoted above, the unbroken silence on the part of advocates, if there were any, of a return to the pre-constitutional era, is significant. For if anywhere at any time or by anybody, the notion had been entertained that the Twenty-first Amendment would completely undo the commerce clause and restore the states to the position they occupied prior to the adoption of the Constitution, surely a notion of such consequence would at least have been mentioned on some occasion. But we have found none.

While the record of ratification furnishes relatively little aid in determining the exact effect to be given to Section 2 as modifying the Commerce Clause, it at least indicates no divergence in the views of the people expressed during the period of ratification from the views expressed

by their chosen representatives in Congress during the period of submission. The views expressed then, reinforced by a consideration of the antecedent evils toward which they were directed, and reinforced further by unofficial expressions of public opinion, political and otherwise, during the period intervening between the submission of the Amendment and its ratification, furnish clear and convincing proof that Section 2 of the Twenty-first Amendment was never intended to do more than permanently embody in the Constitution the substance of the Webb-Kenyon doctrine. From the beginning of the agitation for the Twenty-first Amendment until its final ratification, the problem with which the people and their representatives were grappling was conceived to be the social problem of prohibition. The Twenty-first Amendment was designed to end national prohibition and return the liquor problem to the states. To those states which wished to continue for themselves a genuine policy of prohibition, protection against the importation of intoxicating liquors into their borders was given. Further than this, the amendment did not go. See *Commonwealth* v. *Stofchek,* 185 Atl. 840, 845, 846 (Pa. 1936). There was no purpose to aid wet states in discriminating against rival liquor from other wet states. The trade wars of Colonial days were neither desired nor contemplated.

Summarizing the results concerning the Twenty-first Amendment: the language of Section 2 is not open to the interpretation that the Commerce Clause limitations have been entirely removed as limitations upon state power over traffic in intoxicating liquors and that the states have been restored to the position which they occupied prior to the adoption of the Constitution as to this commodity. Even though the language were thought to justify this result, the very purpose of the Amendment would foreclose any such view and require its rejection. The view of the Twenty-first Amendment for which we contend would wipe out the objectionable and dangerous character of the results which would

inevitably flow from a condition divesting the states of any limitation with respect to legislation pertaining to intoxicating liquors under the commerce clause. The contention we urge would preserve the basic character of the American constitutional system without impeding the powers of states to deal with the problem that the Twenty-first Amendment sought to deal with, namely, the *local policy of prohibition* in each state.

For about a century now the people, the legislatures and the courts of this country have wrestled with this prohibition problem. The states and Congress have legislated on the subject. Twice have the people amended the Constitution with respect to the problem. This Court itself has not been free of divided opinions on the subject. Witness the decisions and opinions pertaining to this subject beginning with the *License Cases* in 1847.

Perhaps no issue except slavery has engendered so much difficulty, bitterness and conflicting judgment. At one time or another in the past one hundred years the country has been in a veritable ferment with respect to the question of prohibition. An incalculable expenditure of time, thought, energy and money has been pressed into the service of its attempted solution, with the Twenty-first Amendment marking the latest chapter in the long course of trial and error in reaching the attempted solution. Surely no one will say that at the end and consummation of this long, drawn-out struggle the constitutional clock has been turned back one hundred fifty years and that with respect to intoxicating liquor there is a throw-back to the commercial chaos which existed prior to the adoption of the Federal Constitution and from which the Commerce Clause in particular was designed to rescue it. The history of the Amendment demonstrates that the people of the United States have not willed it so.

CONCLUSION

We respectfully submit that the judgments of the court below were erroneous, that the complaints stated a cause of action in equity for the relief requested, that the plaintiffs should have had judgment restraining the defendants from giving effect to the Missouri Retaliation Statute and that preliminary injunctions should have been granted in accordance with the prayer of the bill of complaint.

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